SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

NO. 854

WILLIAM H. HARRISON, KENNETH YOUTZ, WILBUR MEAD, LEWIS F. HANSON and CARL EMRICH,

Appellants

VS.

HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELIOTT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD, THYRA THOMSON, as Secretary of State of the State of Wyoming, THYRA THOMSON, MINNIE A. MITCHELL and EVERETT T. COPENHAVER, as members of the Board of the State Board of Election Canvassers, and CLIFFORD P. HANSEN, as Governor of the State of Wyoming,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION TO AFFIRM

A. G. McCLINTOCK
WALTER C. URBIGKIT, JR.
304 West 20th Street
Cheyenne, Wyoming
Attorneys for Appellees

Roy F. Frey Co., Denver, Colo.

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Appellees, HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELIOTT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD, by their counsel and pursuant to Rule 16 of the Rules of the Supreme Court, move the Court to affirm the decision of the District Court.

The Motion to Affirm the Judgment is submitted on the grounds that the questions upon which the decisions of the cause depends are so unsubstantial as to not need further argument.

I.

ISSUE INVOLVED AND QUESTION PRESENTED

Without regard for Appellant's various restatements the essential issue is whether or not the equal protection clause of the Constitution of the United States of America requires that a state's legislative districts be so constituted that one legislative representative only would be elected from each district with multi-member districts being consequently prohibited.

II.

INTRODUCTION

The present appeal is only another step in reapportionment litigation in Wyoming, commenced in 1962 by filing a lawsuit in the state courts, which was terminated by decision on January 7, 1963, *State vs Gage*, Wyo., 377 Pac. 2d 299. These Appellees and the organization which they represent have been involved since 1962 in this litigative effort to afford a constitutional apportionment of the Wyoming State Legislature.

Since success on the broad issue has now been achieved the fight has turned to side attacks, rather than the direct attack on judicial apportionment, and has developed into the present contention that the judiciary is required to provide all one-member districts in legislative apportionment as a replacement for the multi-member districts previously existant and as provided by state constitution.

III.

DEFINITION OF THE ISSUE INVOLVED

A. The question of apportionment of the House of

Representatives of the State of Wyoming should not now be before this Court, since by Order and Judgment dated November 23, 1964, 240 F. Supp 247, the United States District Court found the apportionment of the House to be constitutional and that decision was not subjected to appeal.

B. In their statement of the questions presented, Appellants restate the issue eight separate ways, all of which excluding certain assumptions of fact, can be summarized as the question of whether or not the Order of the Court permitting multi-member districts in consonance with the state constitutional provision relating to such districts would constitute invidious discrimination under the United States Constitution.

C. It would further appear that Appellants further restate the issues involved in the appeal in Paragraphs (i), (ii) and (iii), Section 1 (f), Page 19 of the Jurisdictional Statement, wherein three additional questions are raised, being:

1. Refusal to consider evidence on the question of discrimination.
2. Failure to consider apportionment of the House of Representatives.
3. Geographical and economical factors were not considered which would require subdistricting for constitutional apportionment.

IV.

STATEMENT OF THE FACTS

This litigation has been long, difficult and expensive for the volunteer Plaintiffs, Appellees herein, and it is proper and just that an end should come. The facts material to the present appeal on the issues submitted are simple. Intervenors, Appellants herein are residents of Laramie County. Since all evidence was received at a pre-trial hearing, all material facts can be found from the documents offered at that hearing.

Actually two affidavits of facts of significance were filed, one by Intervenors, Appellants herein, of Keith F. Marsh, which is reproduced in the Jurisdictional Statement and a second in the form of a rebuttal affidavit introduced by Appellees at the pre-trial session, (Plaintiff's Exhibit No. 13). The consolidated substance of both affidavits is to demonstrate that during the past decade the political successes of one political party have substantially improved in legislative elections in Laramie County, where previously the other political party had maintained predominance. However, the latter party generally continues to maintain predominance in many other county elective positions to date.

V.

ARGUMENT

It would appear that the presentation involved in this appeal should properly be divided into two parts.

The first question is whether a multi-member representative district is constitutionally prohibited by the United States Constitution. If this determination is to be made by the United States Supreme Court, further argument is not required and the instant case is an appropriate medium by which, in a memorandum decision the United States Supreme Court might properly vacate the multi-member districting presently existant in Wyoming and coincidentally, also most other state legislatures.

It is submitted that this contention was specifically and categorically decided, contrary to Appellant's position in *Fortson vs Dorsey*, 379 U.S. 433, 13 L.ed. 2d 401, 85 S.Ct. 498 (1965), and certainly by implication considered in *Lucas vs Forty-fourth Assembly*, 379 U.S. 693, 13 L.ed. 2d 699, 85 S.Ct. 715 (1965) and *Scranton vs Drew*, 379 U.S. 40, 13 L.ed. 2d 107, 85 S.Ct. 207 (1964).

Having decided that the Court is not constitutionally *required* to prohibit multi-member districts the issue then

may be further redefined as to whether or not the Court *may* prohibit multi-member districts in opposition to districting provisions of the state constitution. This is specifically the issue decided in *Lucas*, supra. The teaching of all three cases noted above seems clear in effect that multi-member legislative districts permitted by state constitutions are not prohibited by the United States Constitution in absence of clear proof of invidious discrimination directly resulting from the districts as established.

Article 3, Section 3, Wyoming State Constitution, Legislative Apportionment provides:

> Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate.

The decision of the United States District Court invalidated the provision of this Article requiring at least one senator for each county. Appellants contend that the Court was not only permitted but also required to invalidate the rest of the Article, wherein it is provided that the County is the electoral district. As noted by exhibits previously introduced, particularly Plaintiff's original exhibits, introduced January 3, 1964, Wyoming since statehood has had a history of multi-member districts, including the Laramie County apportionment by the Session Laws of 1907 of four senators and ten representatives, (see Plaintiff's original Exhibit No. 4).

The second general sphere of question involves evidentiary proof in the proceedings of discrimination resulting from the multi-member districting for Laramie County.

Contrary to the intimation of Section 1 (F) (i), Page 19 of Appellant's Jurisdictional Statement, the District Court accepted for consideration all evidence offered and the only real facts presented which by the widest construction might be relevant and material, would be the affidavit of Keith F. Marsh, wherein it was apparently intended to show that discrimination is proved by virtue of the restricted area of residency of elected legislators in a multi-member district. The affidavit could hardly constitute even a scintilla of relevant evidence when considered in consonance with the Whitehead affidavit, which was introduced to broaden the scope of discussion to include more electoral offices in the county and to extend the number of electors in order to give a balanced result.

Note should also be taken that the issues adduced at Page 19 of the Jurisdictional Statement were not included in the notice of appeal as required by Rule 10 unless constituting a further restatement of the earlier contended eight issues.

Appellants apparently summarize the issue at hand, at Page 18 of their statement, wherein they say:

> "In Wyoming the voters in certain areas will continue to have their votes reflected in the legislature much the same manner as existed prior to reapportionment. These are the areas where county units were maintained as voting districts. On the other hand, voters in many areas will have their senators and representatives chosen on an entirely different basis and will have their votes cancelled and submerged by dominate political subdivisions."

What Appellants are saying is, and as even the most naive must recognize, that reapportionment litigation involves dominancy of political power and whether or not a majority of voters select a majority of the representatives. Since the rule has now been established by unquestioned law, those that have long supported the minority control through malapportionment are adamantly fighting for a

one-member district absolute requirement with the hope that somehow the moderation of the majority control can therein be obtained. Gerrymandering is not an unconsidered element in this vital fight.

Appellees herein do not necessarily oppose a general policy of smaller legislative districts or even one-member districts. It is the position of Appellees, in concurrence with what is believed to have been established and determind by decisions of the United States Supreme Court, that the question of the size of legislative districts, within reason, is a province of state law. The rule is submitted that the Federal Court is not *required* to invalidate state provisions permitting multi-member districts and secondly, an issue not herein found to be involved, that the Federal Court is not *permitted* to invalidate state constitutional provisions permitting multi-member districts in the absence of specific evidence that the multi-member districts were constituted and utilized for the purpose of practicing discrimination against a segment of the voting society.

VI.

CONCLUSION

It is respectfully submitted that the appeal should be denied and pursuant to Rule 16, Rules of the Supreme Court, the decision of the District Court affirmed.

Respectfully submitted,

A. G. McCLINTOCK
WALTER C. URBIGKIT, JR.
304 West 20th Street
Cheyenne, Wyoming

Attorneys for Appellees